

**THIS OPINION WAS NOT WRITTEN FOR PUBLICATION**

The opinion in support of the decision being entered today  
(1) was not written for publication in a law journal and  
(2) is not binding precedent of the Board.

Paper No. 33

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte PAUL A. CANTRELL

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Appeal No. 98-0111  
Application 08/290,213<sup>1</sup>

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ON BRIEF

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Before ABRAMS, FRANKFORT, and CRAWFORD, Administrative Patent Judges.

ABRAMS, Administrative Patent Judge.

**DECISION ON APPEAL**

This is an appeal from the decision of the examiner  
finally rejecting claims 1, 3-6 and 8-13. Claims 2 and 7 have

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<sup>1</sup>Application for patent filed August 15, 1994.

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been canceled. Claim 14 has been indicated as containing allowable subject matter.

The appellant's invention is directed to a bed liner for a passenger carrying vehicle. The claims on appeal have been reproduced in an appendix to the Brief.

#### **THE REFERENCES**

The references relied upon by the examiner to support the final rejection are:

Taylor	2,912,137	Nov. 10, 1959
Davis	4,890,874	Jan. 2, 1990
VanHoose	5,419,602	May 30, 1995

(filed May 5, 1993)

#### **THE REJECTIONS**

Claims 6, 8-10 and 13 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Taylor.

Claims 6, 9 and 11 stand rejected under 35 U.S.C. § 103 as being unpatentable over Davis in view of Taylor.

Claims 1, 3, 5, 6 and 12 stand rejected under 35 U.S.C. § 103 as being unpatentable over VanHoose in view of Taylor.

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Claim 4 stands rejected under 35 U.S.C. § 103 as being unpatentable over VanHoose in view of Taylor and Davis.<sup>2</sup>

The rejections are explained in the Examiner's Answer.

The opposing viewpoints of the appellant are set forth in the Brief.

#### **OPINION**

At the outset, we note that the appellant has stated on page 6 of the Brief that "[c]laims 1 and 3-6 and 8-13 all stand or fall together." However, since there are four separate rejections based upon the prior art, with regard to each of which the appellant provided argument, but has not argued the merits of any particular claim apart from the others, we shall interpret his statement as meaning that all claims within each rejection are to stand or fall with a representative claim of the group. See *In re Kaslow*, 707 F.2d 1366, 1376, 217 USPQ 1089, 1096 (Fed. Cir. 1983).

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<sup>2</sup>A rejection of claims 13 and 14 under 35 U.S.C. § 112, second paragraph, although recited on page 4 of the Answer, was overcome by amendment, as is indicated on page 6 of that same paper.

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*The Rejection Under 35 U.S.C. § 102(b)*

The guidance provided by our reviewing court with regard to the matter of anticipation is as follows: Anticipation is established only when a single prior art reference discloses, either expressly or under the principles of inherency, each and every element of the claimed invention. See *In re Paulsen*, 30 F.3d 1475, 1480-1481, 31 USPQ2d 1671, 1675 (Fed. Cir. 1994). Anticipation by a prior art reference does not require either the inventive concept of the claimed subject matter or recognition of inherent properties that may be possessed by the reference. See *Verdegaal Brothers Inc. v. Union Oil Co. of California*, 814 F.2d 628, 633, 2 USPQ2d 1051, 1054 (Fed. Cir. 1987). Nor does it require that the reference teach what the applicant is claiming, but only that the claim on appeal "read on" something disclosed in the reference, *i.e.*, all limitations of the claim are found in the reference. See *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984). It is only necessary that the reference include structure capable of performing the recited function in order

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to meet the functional limitations of the claim. See *In re Mott*, 557 F.2d 266, 269, 194 USPQ 305, 307 (CCPA 1977).

Claim 6 is directed to the combination of an automobile having a cargo area and a protective liner disposed in the cargo area. Taylor discloses a liner for a container that is used in, among other things, "trucks and other vehicles" (column 1, lines 22 and 23). The appellant has set forth two grounds upon which he believes Taylor does not anticipate the subject matter recited in claim 6. We are not persuaded by either of them.

The first argument is that "[w]ith reference to Figure 3 of Taylor, there is no indication that this embodiment . . . provides overlapping liner members," as required by claim 6 (Brief, pages 9 and 10). This clearly is not the case. As pointed out by the Examiner on page 7 of the Answer, Taylor explicitly teaches, with reference to Figure 3, that "the floor and wall sections are merely overlapped as necessary to fit the container to be lined" (column 3, lines 52 and 53).

The second point raised by the appellant is that "Taylor teaches the use of flexible and not rigid material" (Brief, page 10). However, claim 6 does not require that the material

be rigid, but that it be "substantially rigid" (emphasis added). Thus, our first observation is that this argument must fail because it is predicated upon a limitation that is not present in the claim. See *In re Self*, 671 F.2d 1344, 1348, 213 USPQ 1, 5 (CCPA 1982). Moving now to a comparison of the claim language recited with Taylor, we first note that the only guidance given for "substantially," which is a term of degree, is the statement on page 8 of the specification that the liner members be

formed of a substantially rigid material, such as any suitable high density moldable thermoplastic material, e.g., polyethylene, which provides sturdy, reliable resistance to cutting, puncture, abrasion, and other damage from various cargo materials, while also providing a sufficient degree of flexibility and resiliency to permit the respective ribs 30 and channels 32 . . . to fit securely and matingly into one another.

Taylor describes his invention as being "a thin-walled flexible liner adapted to conform to the configuration of a container and to be self-supporting therein when empty for [*sic*, and for] at least a portion of its height when full" (column 1, lines 68-71, emphasis added), which can be made of "resinous plastic films or sheets formed from various thermoplastic materials" (column 2, lines 62 and 63).

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Taylor's statement that the material used for the disclosed device is thermoplastic sheets, and that these sheets are of such rigidity as to be self-supporting, causes us to agree with the examiner that the Taylor device meets the requirement in claim 6 that the liner be of a "substantially rigid material." This being the case, we shall sustain the Section 102 rejection of independent claim 6, as well as the rejection of claims 8-10 and 13, which are grouped therewith.

*The Rejections Under 35 U.S.C. § 103*

In rejections under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness (see *In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993)), which is established when the teachings of the prior art itself would appear to have suggested the claimed subject matter to one of ordinary skill in the art (see *In re Bell*, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993)). This is not to say, however, that the claimed invention must expressly be suggested in any one or all of the references. Rather, the test for obviousness is what the combined teachings of the references would have

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suggested to one of ordinary skill in the art (see *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1025, 226 USPQ 881, 886-87 (Fed. Cir. 1985)), considering that a conclusion of obviousness may be made from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference (see *In re Bozek*, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969)), with skill being presumed on the part of the artisan, rather than the lack thereof (see *In re Sovish*, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985)). Insofar as the references themselves are concerned, we are bound to consider the disclosure of each for what it fairly teaches one of ordinary skill in the art, including not only the specific teachings, but also the inferences which one of ordinary skill in the art would reasonably have been expected to draw therefrom

(see *In re Boe*, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966) and *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968)).

Independent claim 6 stands rejected as being unpatentable over Davis in view of Taylor. Here, it is the examiner's



position that Davis discloses all of the subject matter claimed except for the overlapping feature, which would have been an obvious modification in view of the teachings of Taylor. The appellant argues that the Taylor device is formed of flexible material and that Taylor does not indicate that separate container portions should overlap, and concludes for several reasons that this would be a step backward for the Davis liner (Brief, pages 10 and 11). We do not agree.

Davis discloses a one-piece foldable liner for a pickup truck bed. Among the objectives of the Davis invention are conforming the liner to the shape of the pickup truck bed, making it inexpensive and disposable, foldable into a compact size and shape for handling and storage, able to resist moisture, and capable of cushioning the objects being carried. We agree with the examiner that one of ordinary skill in the art would have found it obvious to modify the Davis liner by making it in several overlapping pieces so that it would fit different size pickup truck beds, in view of the explicit teaching of Taylor (column 3, lines 52-57). To do so would not compromise any of Davis' objectives. We further note that the preferred material from which Davis manufactures the liner

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is described as "stiff cardboard," along with fiberboard, paperboard or plastic material (column 5, lines 10-12), which indicates that it is substantially rigid.

We therefore will sustain the Section 103 rejection of independent claim 6 and dependent claims 9 and 11, which are grouped therewith.

The next rejection under 35 U.S.C. § 103 is that independent claims 1 and 6, and dependent claims 3, 5 and 12, are unpatentable over VanHoose in view of Taylor. As was the case above with regard to Davis, the examiner's position is that VanHoose discloses all of the claimed subject matter except for the feature of the floor being formed of a plurality of overlapping sections, which is taught by Taylor, the conclusion being that it would have been obvious to construct the VanHoose device in that manner. The same arguments are raised by the appellant, and we find them to unpersuasive here, also. From our perspective, one of ordinary skill in the art would have found it obvious to modify the VanHoose cargo area liner by providing overlapping sections so that vehicle floor areas of different sizes can be

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accommodated, in view of the explicit teaching to this effect provided by Taylor.

The rejection of independent claims 1 and 6, and dependent claims 3, 5 and 12, is sustained.

The last rejection posed by the examiner is that claim 4 is unpatentable over VanHoose in view of Taylor and Davis, the latter being cited for its teaching of providing the liner with foldable sections to facilitate storage and handling. The appellant argues that it would not have been obvious to fold the wall sections of the VanHoose liner because they already are detachable from the floor section. We do not agree. It is our view that one of ordinary skill in the art would have been taught by Davis to provide fold lines in whatever portions need to be foldable from their assembled configuration to make storage and handling more convenient. The fact that these elements may also be detachable from others of the elements does not alter this conclusion. We point out that the claim merely requires that "said side and end wall sections of each said liner member are foldable relative to the floor section thereof," which is broad enough to include folding the wall sections for this purpose, even if

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they also are detachable from the floor, since the claim sets forth no particular relationship with the floor section once they are folded (i.e. folded against the floor section).

The rejection of claim 4 is sustained.

We have carefully considered all of the appellant's arguments, but they have not convinced us that the positions taken by the examiner are in error. Our opinion with regard to the various arguments has been set forth above. As for the argument that the rejections involve hindsight, we wish to note that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 1395, 170 USPQ 209, 212 (CCPA 1971). We believe that to be the case here.

#### **SUMMARY**

All of the rejections are sustained.

The decision of the examiner is affirmed.

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No time period for taking any subsequent action in  
connection with this appeal may be extended under  
37 CFR § 1.136(a).

AFFIRMED

	Neal E. Abrams	)	
	Administrative Patent Judge	)	
		)	
		)	
		)	
	Charles E. Frankfort	)	BOARD OF
PATENT	Administrative Patent Judge	)	APPEALS AND
		)	INTERFERENCES
		)	
	Murriel E. Crawford	)	
	Administrative Patent Judge	)	

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